

2003

State of Utah v. Douglas A. Lovell : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

L. Clark Donaldson.

J. Frederick Voros, Jr..

Recommended Citation

Brief of Appellant, *Utah v. Lovell*, No. 20030262.00 (Utah Supreme Court, 2003).
https://digitalcommons.law.byu.edu/byu_sc2/2358

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

DOUGLAS A. LOVELL

Defendant.

Trial Court No. 921900407

Appellate Court No. 20030262 SC

BRIEF OF THE APPELLANT

**Appeal from a Final Order of the Second Judicial District Court, Weber County,
Utah, Honorable Michael D. Lyon**

J. FREDRICK VOROS, JR.
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114

L. CLARK DONALDSON
356 East 900 South
Salt Lake City, UT 84111

FILED
UTAH SUPREME COURT
SEP 15 2003
PAT BARTHOLOMEW
CLERK OF THE COURT

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

DOUGLAS A. LOVELL

Defendant.

Trial Court No. 921900407

Appellate Court No. 20030262 SC

BRIEF OF THE APPELLANT

**Appeal from a Final Order of the Second Judicial District Court, Weber County,
Utah, Honorable Michael D. Lyon**

J. FREDRICK VOROS, JR.
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114

L. CLARK DONALDSON
356 East 900 South
Salt Lake City, UT 84111

PARTIES

Mr. Douglas A. Lovell, an inmate at the Utah State Penitentiary, is the appellant.

The State of Utah is the appellee.

TABLE OF CONTENTS

	Page
JURISDICTION	1
STATEMENT OF ISSUES AND STANDARDS OF REVIEW	1
DETERMINATIVE PROVISIONS	3
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENTS	10
ARGUMENT	11
I. THE TRIAL COURT DID NOT LOSE JURISDICTION TO CONSIDER MR. LOVELL'S MOTION TO WITHDRAW PLEA.....	11
A. The Filing of the Notice of Appeal Did Not Divest the Trial Court of Jurisdiction to Hear the Motion to Withdraw Guilty Plea	11
B. If a Notice of Appeal Would Divest the Trial Court of Jurisdiction To Consider a Timely, But Later-Filed, Motion To Withdraw Plea, the Trial Court Should Have Determined Which Was "Filed" or "Made" First, or Determined Mr. Lovell's Desires in View of the Patent Conflict Between Mr. Lovell and his Counsel.....	17
1. Mr. Lovell's Motion To Withdraw Guilty Plea Was "Made" Before the Notice of Appeal Was Filed	18
2. Under The Circumstances, Equal Protection and Due Process Require Application of a "Mailbox Rule" to Deem that Mr. Lovell's Motion Was Filed Prior to the Notice of Appeal.....	20
3. If No "Mailbox Rule" Applies, When Faced With the Inconsistent and Conflicting Actions of Mr. Lovell and His Counsel, the Trial Court Should Have Ascertained How Mr. Lovell Desired to Proceed	24
II. MR. LOVELL IS ENTITLED TO A HEARING ON THE MERITS OF HIS MOTION TO WITHDRAW THE GUILTY PLEA.....	25
A. A Motion to Withdraw Guilty Plea Must Be Heard and Resolved in the First Instance by the Trial Court	25
B. The Motion to Withdraw Guilty Plea Was Never Expressly Resolved by this Court Nor Was It "Implicitly" Resolved Because There Never Was a Ruling of the Trial Court on the Merits of the Motion That Could Be Appealed	26
C. The Motion Was Timely Because Ostler Governs Motions to Withdraw That Were Pending at the Time It Was Decided	28

TABLE OF CONTENTS

	Page
CONCLUSION	31

TABLE OF AUTHORITIES

Page

FEDERAL CASES

<u>Caldwell v. Amend</u> , 30 F.3d 1199 (9th Cir. 1994).....	22
<u>Houston v. Lack</u> , 487 U.S. 266 (1988).....	19, 21

STATE CASES

<u>Berry v. Beech Aircraft Corp.</u> , 717 P.2d 670 (Utah 1985).....	23
<u>Cheves v. Williams</u> , 1999 UT 86, 993 P.2d 191	12
<u>Christiansen v. Harris</u> , 163 P.2d 314 (Utah 1945)	23, 28
<u>Davis v. State</u> , 763 So. 2d 519 (Fla. App. 2000).....	14
<u>Frost v. District Court</u> , 83 P.2d 737 (Utah 1938).....	11, 12
<u>Garrison v. Davis</u> , 54 P.2d 439 (Utah 1936).....	12
<u>Haag v. State</u> , 591 So. 2d 614 (Fla. 1992).....	21, 22
<u>Heslop v. Bank of Utah</u> , 839 P.2d 828 (Utah 1992)	31
<u>James v. Galetka</u> , 965 P.2d 567 (Utah App. 1998)	1, 2
<u>Labrum v. Utah State Board of Pardons</u> , 870 P.2d 902 (Utah 1993).....	31
<u>Landes v. Capital City Bank</u> , 795 P.2d 1127 (Utah 1990).....	1, 2
<u>Malan v. Lewis</u> , 693 P.2d 661 (Utah 1984)	31
<u>People v. Canterbury</u> , 730 N.E.2d 1198 (Ill. App. 2000).....	14
<u>People v. Miraglia</u> , 753 N.E.2d 398 (Ill. App. 2001), <u>app. denied</u> , 763 N.E.2d 775 (Ill. 2001).....	13
<u>Peters v. Peters</u> , 394 P.2d 71 (Utah 1964).....	12
<u>Petersen v. Utah Board of Pardons</u> , 907 P.2d 1148 (Utah 1995).....	12
<u>Setala v. J.C. Penney Co.</u> , 40 P.3d 886 (Haw. 2002)	22

TABLE OF AUTHORITIES

	Page
<u>State v. Canfield</u> , 917 P.2d 561 (Utah App. 1996).....	21
<u>State v. Gibbons</u> , 740 P.2d 1309 (Utah 1987).....	15, 16
<u>State v. Honie</u> , 2002 UT 4, 57 P.3d 977.....	28
<u>State v. Jiminez</u> , 938 P.2d 264 (Utah 1997).....	13
<u>State v. Johnson</u> , 856 P.2d 1064 (Utah 1993).....	29, 30
<u>State v. Kelly</u> , 770 P.2d 98 (Utah 1988)	16, 17
<u>State v. Lorrah</u> , 761 P.2d 1388 (Utah 1988)	12
<u>State v. Lovell</u> , 1999 UT 40, 984 P.2d 382.....	5, 27
<u>State v. McGee</u> , 2001 UT 69, 31 P.3d 531.....	30
<u>State v. Mohi</u> , 901 P.2d 991 (Utah 1995).....	23, 24
<u>State v. Ostler</u> , 2001 UT 68, 31 P.3d 528.....	10, 11, 14, 15, 28, 29, 30, 31
<u>State v. Palmer</u> , 777 P.2d 521 (Utah App. 1989)	19
<u>State v. Parker</u> , 936 P.2d 1118 (Utah App. 1997)	19
<u>State v. Price</u> , 837 P.2d 578 (Utah App. 1992)	5, 11, 28, 30
<u>State v. Robinson</u> , 860 P.2d 979 (Utah App. 1993), <u>cert. denied</u> , 878 P.2d 1154 (Utah 1994).....	12
<u>State v. Sampson</u> , 806 P.2d 233 (Utah App. 1991).....	13
<u>State v. Saunders</u> , 1999 UT 59	31
<u>State v. Taysom</u> , 886 P.2d 513 (Utah 1994)	31
<u>State v. Wade</u> , 873 P.2d 167 (Idaho App. 1994).....	13
<u>Woody v. State</u> , 833 P.2d 257 (Okla. 1992).....	22

TABLE OF AUTHORITIES

Page

STATE STATUTES

Utah Code Ann. § 76-3-206(2).....	3, 10, 13
Utah Code Ann. § 77-13-6(2).....	3, 18, 28
Utah Code Ann. § 78-2-2(3).....	1

RULES

Utah R. App. P. 3(a)	26
Utah R. App. P. 4(f).....	19
Utah R. Civ. P. 5(b)(1); Utah R. Civ. P. 5(d)	19
Utah R. Crim. P. 22(e).....	11, 19, 26

JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(i) because this is an appeal from a trial court in a capital felony case.

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

1. Whether Mr. Lovell is entitled to have a hearing on the merits of a timely-filed motion to withdraw his guilty plea? This issue is a question of law that is subject to review for correctness, giving no particular deference to the trial court's decision. See Landes v. Capital City Bank, 795 P.2d 1127, 1129 (Utah 1990); James v. Galetka, 965 P.2d 567, 570 (Utah App. 1998). This issue involves several subsidiary issues.

(a) Whether the trial court erred in ruling that it lost jurisdiction to hear Mr. Lovell's motion to withdraw his guilty plea as a consequence of an unauthorized and unnecessary notice of appeal filed by his public defender after Mr. Lovell made his motion to withdraw the guilty plea? This issue is a question of law that is subject to review for correctness, giving no particular deference to the trial court's decision. See Landes, 795 P.2d at 1129; James, 965 P.2d at 570.

(b) If the filing of the notice of appeal would divest the trial court of jurisdiction to hear the motion to withdraw the plea, whether the trial court erred in failing to resolve the conflict between Mr. Lovell's *pro se* motion to withdraw his plea and the unauthorized and unnecessary notice of appeal filed by his counsel? This issue is a question of law that is subject to review for correctness, giving no particular deference to the trial court's decision. See Landes, 795 P.2d at 1129; James, 965 P.2d at 570.

(c) If the trial court lost jurisdiction to hear Mr. Lovell's motion to withdraw his guilty plea when the notice of appeal was filed, whether the trial court erred in ruling that it never regained jurisdiction to decide the motion to withdraw the guilty plea following the appeal? This issue is a question of law that is subject to review for correctness, giving no particular deference to the trial court's decision. See Landes, 795 P.2d at 1129; James, 965 P.2d at 570.

(d) Whether the trial court erred in ruling that this Court expressly or implicitly heard and denied Mr. Lovell's motion to withdraw his guilty plea in its ruling on direct appeal? This issue is a question of law that is subject to review for correctness, giving no particular deference to the trial court's decision. See Landes, 795 P.2d at 1129; James, 965 P.2d at 570.

(e) Whether the trial court erred in ruling that Mr. Lovell's motion to withdraw his guilty plea was untimely even though it was filed within 30 days of sentencing? This issue is a question of law that is subject to review for correctness, giving no particular deference to the trial court's decision. See Landes, 795 P.2d at 1129; James, 965 P.2d at 570.

All of these issue were preserved below. R. 2252 at pages 44-50.¹

¹ The appellate record has been numbered in a somewhat random fashion with some of the transcripts numbered in continuous fashion and others not. Where a transcript is not numbered continuously, counsel has provided the initial number of the transcript followed by the relevant pages cited. Thus, R. 2252 at pages 44-50.

DETERMINATIVE PROVISIONS

Article I, Section 7 of the Utah Constitution:

“No person shall be deprived of life, liberty or property, without due process of law.”

Article 1, Section 11 of the Utah Constitution:

“All courts shall be open, and every person, for any injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.”

Article I, Section 24 of the Utah Constitution:

“All laws of a general nature shall have uniform operation.”

Utah Code Ann. § 77-13-6(2)(b) (2002):²

“A request to withdraw a plea of guilty or no contest is made by motion and shall be made within 30 days after entry of the plea.”

Utah Code Ann. § 76-3-206(2) (2001):

“The judgment of conviction and sentence of death is subject to automatic review by the Utah Supreme Court within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Utah Supreme Court for good cause shown.”

² This provision has recently been amended. However, that amendment is not relevant to the present appeal as the events occurred before the amendment.

STATEMENT OF THE CASE

A. Nature of the Case. This is an appeal from the trial court's ruling dismissing Mr. Lovell's motion to withdraw his guilty plea on jurisdictional grounds. The core issue on appeal is whether Mr. Lovell is entitled to have a hearing on the merits of a timely-filed motion to withdraw his plea. Mr. Lovell pleaded guilty to capital murder and was sentenced to death by the trial court. Within days after the sentencing hearing, Mr. Lovell mailed a *pro se* motion to withdraw his guilty plea. Shortly thereafter, his public defender, John Caine, filed a notice of appeal without consulting Mr. Lovell. The trial court never heard nor ruled on the motion to withdraw the guilty plea and, accordingly, there was no ruling on that issue to appeal. However, the direct appeal proceeded on other issues. This Court first issued a limited remand under Rule 23(B) and later affirmed the conviction on direct appeal. Mr. Lovell thereafter renewed his motion to withdraw the guilty plea in order to obtain a ruling from the trial court. The State filed a motion to dismiss the motion, arguing that the trial court did not have jurisdiction to hear the motion and that Mr. Lovell's motion was untimely. The trial court granted the State's motion to dismiss. To date, the motion has never been heard on the merits.

B. Course of Proceedings. Within days of his sentencing, in a letter dated August 25, 1993, Mr. Lovell, a prisoner in the Utah State Prison, Draper, Utah, advised the trial court that he wanted to withdraw his guilty plea. R. 383. The trial court never considered that motion. On October 22, 2001, Mr. Lovell filed a renewed motion to withdraw his guilty plea and request for hearing. R. 1827-30 On March 12, 2002, the

State filed a Motion to Dismiss Mr. Lovell's Motion to Withdraw Guilty Plea and State's Objection to Defendant's Renewed Motion to Withdraw Guilty Plea. R. 2146-2219. The State did not respond to the merits of Mr. Lovell's motion to withdraw the plea. R. 2146, R.2252 at pages 2-4. The parties fully briefed the State's Motion to Dismiss. R. 2147-2219; R. 1854-2145. On October 2, 2002, the trial court heard oral argument on the State's Motion. R. 2252 at pages 1-51.

C. Disposition Below. On February 25, 2003, the trial court entered its Findings of Fact, Conclusions of Law and Order granting the State's Motion to Dismiss. R. 2230-34 (also attached to the addendum hereto). Specifically, the trial court granted the State's motion for the following reasons: (1) it concluded that this Court's ruling in State v. Lovell, 1999 UT 40, 984 P.2d 382 that "all of Lovell's claims fail" resolved Mr. Lovell's motion to withdraw his guilty plea; (2) it concluded that State v. Price, 837 P.2d 578 (Utah App. 1992) applies because it was controlling at the time of Mr. Lovell's *pro se* motion to withdraw his guilty plea and rendered the motion untimely because it was filed sixty-three days after his guilty plea; (3) it concluded that the filing of the notice of appeal by Mr. Lovell's attorney deprived the trial court forever of jurisdiction to consider the motion to withdraw the guilty plea; and (4) it concluded that this Court's denial of remand on the motion to withdraw guilty plea and this Court's opinion on direct appeal forever foreclosed the trial court from considering Mr. Lovell's motion to withdraw guilty plea. R. 2232.

D. Statement of Facts. On June 28, 1993, Mr. Lovell entered a guilty plea to aggravated murder, a capital felony. R. 231-2. At that time, the trial court advised Mr.

Lovell that if the death penalty was imposed, he would not need to file an appeal but that such an appeal would be automatic. R. 668. The trial court's Judgment and Sentence of Death was signed August 18, 1993, and filed with the court clerk on August 23, 1993. R. 373.

In a letter dated August 25, 1993, Mr. Lovell, then a prisoner in the Utah State Prison, advised the trial court that he wanted to withdraw his guilty plea. R. 383. He also advised the trial court that he had communicated this desire to his court-appointed attorney, John Caine, more than a week earlier and that Mr. Caine had not responded. R. 383. On this same date, Mr. Lovell posted this letter in an appropriately addressed envelope with prison personnel for mailing pursuant to prison procedures. R. 1910. The letter was stamped by the court clerk on August 31, 1993. R. 383. The actual date of receipt is unknown.

On August 30, 1993, Mr. Caine filed a Notice of Appeal. R. 381-2. Mr. Caine did not consult with Mr. Lovell or obtain his consent prior to filing the Notice of Appeal. R. 383. On September 9, 1993, Mr. Lovell wrote a letter to the trial court in which he stated that he wished to discharge Mr. Caine as his attorney. R. 388.

On September 20, 1993, the trial court held a hearing at which Mr. Caine discussed with the trial court Mr. Lovell's desire to withdraw his plea and his desire to discharge Mr. Caine as counsel. R. 1326. Mr. Caine was permitted to withdraw. R. 1328-30. The State did not raise any objection at this hearing that the trial court had lost jurisdiction over the motion to withdraw guilty plea by virtue of the notice of appeal. R. 1329-30. To the contrary, the trial court and prosecutor assumed there would be a

hearing notwithstanding the appeal. The prosecutor told the trial court: “[T]he Supreme Court moving on the appeal wouldn’t have anything to do with Your Honor’s ruling on [the motion to withdraw plea].” R. 1330. Since no jurisdictional issue was raised, the trial court did not attempt to determine whether Mr. Lovell desired to proceed with the notice of appeal in light of the expressed conflicts with his counsel. R. 1326-35. With the agreement of the parties, the hearing on the motion to withdraw plea was continued until December 13, 1993, to allow Mr. Lovell to obtain new counsel. R. 1334.

On September 21, 1993, the State filed an Objection to Defendant’s Motion to Withdraw Guilty Plea on the grounds that the motion was untimely and failed to state good cause. R. 402. The State did not object to jurisdiction on the basis of the notice of appeal. R. 402. Mr. Lovell appeared without counsel on December 13, 1993, and the matter was continued until January 3, 1994. R. 1340. On January 3, 1994, Stephen Laker was appointed as counsel for Mr. Lovell and the hearing on the motion to withdraw plea was set for February 7, 1994. R. 1378. On February 2, 1994, the hearing date was cancelled at Mr. Laker’s request to allow Mr. Lovell to obtain his own counsel. R. 2242 at page 3. On March 28, 1994, James Bradshaw and Karen Chaney entered an appearance on behalf of Mr. Lovell. R. 1384-5.

On July 7, 1994, the State moved to dismiss the motion to withdraw guilty plea for failure to prosecute. R. 1386-7. A hearing was held on August 22, 1994, at which Mr. Lovell’s new counsel was present. R. 2242 at page 2. At this hearing, the parties and the trial court expressed confusion about the status of jurisdiction over the motion to withdraw guilty plea. R. 2242 at page 4-7. Mr. Lovell’s new counsel indicated that he

was “at a bit of disadvantage because you all were here and I was not,” and that the motion had not been prosecuted because “there’s been some very serious questions about whether this court has jurisdiction.” R. 2242 at page 4. Mr. Lovell’s counsel suggested that the best approach was to allow this Court to address the issue in the context of the motion to remand and then for the trial court to take action, stating:

If, in fact, the [supreme] court grants the request for remand, certainly its appropriate for this court to then rule on the motion for withdrawal of the plea. If the [supreme] court denies the motion for remand, then it very well may be appropriate for this court to reconsider the State’s motion [to dismiss for failure to prosecute]. But at this point in time I think it’s premature and inappropriate for this court to take any—any—to take any action in regard to Mr. Lovell’s case or this specific motion.

R. 2242 at page 5. The trial judge responded that he was also confused and would wait to see if the Supreme Court provided guidance, noting:

I’m inclined to think you’re probably correct. And I’d be interested to see what the Supreme Court has to say about the effect of the filing of the appeal on staying the—the time for filing. The motion to set aside [the plea] may very well impact that issue. In giving a ruling on that, that would sure be helpful to me. . . . I think—I think the filing of the appeal has effectively deprived me of jurisdiction in the case unless the Supreme Court agrees to the remand. So why don’t we let the attorney general worry about it until we hear from them.

R. 2242 at page 5. Mr. Lovell’s counsel offered to prepare an order, but the trial court declined to issue an order at that juncture. R. 2242 at page 7.

Following that hearing, on January 17, 1995, this Court granted a limited remand “for the trial court to enter findings of fact with respect to defendant’s allegation of conflict of interest between defense counsel and the Weber County attorney.” R. 2145.

This Court declined to remand on the motion to withdraw the guilty plea or any other issue and did not comment on the question of jurisdiction, stating, “no other issue shall be addressed on the remand, but may be addressed in any appropriate subsequent proceedings.” R. 2145.

Following the appeal of this matter, on January 20, 2000, this Court remitted this case to the trial court. R. 1814. The motion to withdraw guilty plea has never been heard or resolved on the merits by any court.

SUMMARY OF ARGUMENTS

Mr. Lovell is entitled to a hearing on the merits of his motion to withdraw guilty plea. The trial court either retained jurisdiction to address Mr. Lovell's motion, or regained it after the appeal was finished, and Mr. Lovell's motion is timely under this Court's decision in State v. Ostler, 2001 UT 68, 31 P.3d 528, since it would apply to any pending motion to withdraw a plea.

The trial court did not lose jurisdiction to hear Mr. Lovell's motion to withdraw his plea because it is the type of post-trial motion over which a trial court retains jurisdiction, particularly where the notice of appeal was unauthorized and unnecessary.³ But, if a notice of appeal would deprive the trial court of jurisdiction during the pendency of the appeal and if the order of "filing" of a motion to withdraw plea and a notice of appeal is determinative, the trial court should have determined that Mr. Lovell's motion to withdraw plea was "made" before the notice of appeal was "filed" by his attorney. Alternatively, the trial court should have applied a "mailbox rule" to deem that the motion to withdraw was filed first. In any event, if the motion to withdraw and the notice of appeal created a jurisdictional conflict, the trial court should have resolved the patent conflict between the expressed wishes of Mr. Lovell and the contradictory actions of his attorney.

³ See Utah Code Ann. § 76-3-206(2) ("The judgment of conviction and sentence of death is subject to automatic review by the Utah State Supreme Court within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Utah State Supreme Court for good cause shown.").

Furthermore, even if the trial court “lost” jurisdiction while the matter was on appeal, it did not lose it forever. This Court never ruled on the merits of the motion to withdraw on appeal because it had never been determined in the first instance by the trial court. Mr. Lovell has never had his “day in court” on his motion to withdraw and he is entitled to have the motion heard and resolved on the merits.

Finally, Ostler applies to all motions pending at the time it was decided, including Mr. Lovell’s motion. Since the motion to withdraw guilty plea was still pending when Ostler was issued, the overruled Court of Appeals decision in Price should not be applied. Under Ostler, Mr. Lovell filed a timely motion to withdraw guilty plea which should be heard on its merits.

This Court should reverse the trial court’s order granting the State’s Motion to Dismiss and remand this matter to the trial court with direction to hear and rule on the merits of Mr. Lovell’s motion to withdraw guilty plea.

ARGUMENT

I. THE TRIAL COURT DID NOT LOSE JURISDICTION TO CONSIDER MR. LOVELL’S MOTION TO WITHDRAW PLEA

A. The Filing of the Notice of Appeal Did Not Divest the Trial Court of Jurisdiction to Hear the Motion to Withdraw Guilty Plea.

The trial court erred in ruling that the filing of the notice of appeal divested the trial court of jurisdiction to hear Mr. Lovell’s motion to withdraw guilty plea. While a trial court generally loses jurisdiction over the merits of a controversy once an appeal is filed, see, e.g., Frost v. District Court, 83 P.2d 737, 740 (Utah 1938), there are numerous exceptions to this rule. See, e.g., Utah R. Crim. P. 22(e) (“court may correct an illegal

sentence, or a sentence imposed in an illegal manner, at any time”); Cheves v. Williams, 1999 UT 86, ¶¶ 46, 48, 993 P.2d 191 (holding that under Rule 8 of the Utah Rules of Criminal Procedure “the trial court has jurisdiction, in the first instance, over a case on appeal to determine whether a stay of judgment pending appeal should be granted,” and that “absent a stay of judgment either by the trial court itself or by an appellate court pending appeal, a trial court has jurisdiction to enforce its judgment”); Petersen v. Utah Bd. of Pardons, 907 P.2d 1148, 1153 (Utah 1995) (holding that trial court retains jurisdiction over a parolee or probationer beyond the statutory time period if the parolee or probationer “violates the terms” of the parole or probation and process is served on the parolee or probationer “within that time”) (citations omitted); State v. Robinson, 860 P.2d 979, 982 (Utah App. 1993) (stating that in probation cases, the trial court may “retain jurisdiction of the case and continue the defendant on bench probation . . . for the limited purpose of enforcing the payment of fines and restitution”), cert. denied, 878 P.2d 1154 (Utah 1994); State v. Lorrach, 761 P.2d 1388, 1389 (Utah 1988) (stating that trial court may correct clerical mistakes in judgments at any time); Peters v. Peters, 394 P.2d 71, 73 (Utah 1964) (stating that trial “court should and does have continuing jurisdiction in the action over the family’s continuing problems to protect the rights and interests of the parties”); Frost v. District Court, 83 P.2d 737, 740 (Utah 1938) (stating that trial court retains jurisdiction “to correct clerical errors at any time”); Garrison v. Davis, 54 P.2d 439, 443 (Utah 1936) (stating that trial court has “inherent power to correct clerical errors at any time, and to make the judgment entry correspond with the judgment rendered”) (citation and internal quotations omitted).

Specifically, a trial court retains jurisdiction to consider post trial motions after an appeal is filed. The “purpose of a posttrial motion is to alert the trial court to trial errors so that a new trial may be granted if warranted, without the necessity of an appeal.” People v. Miraglia, 753 N.E.2d 398, 402 (Ill. App. 2001), app. denied, 763 N.E.2d 775 (Ill. 2001). In Miraglia, the defendant filed two posttrial motions including one after the notice of appeal was filed. Even though the notice of appeal had been filed, the trial court “still retained jurisdiction to rule on [the second post trial] motion,” and the motion “rendered the original notice of appeal ineffectual.” Id.; see also State v. Sampson, 806 P.2d 233, 234 (Utah App. 1991) (holding that trial court retained jurisdiction to consider motion for certificate of probable cause even though case was on appeal because motion had to be made to trial court in first instance); State v. Wade, 873 P.2d 167 (Idaho App. 1994) (trial court “retained jurisdiction to rule upon” a motion filed but not ruled upon prior to notice of appeal). This principle is especially applicable in Utah death penalty cases because the judgment is subject to automatic review within 60 days of certification of the record. See Utah Code Ann. § 76-3-206(2). In this case, the unnecessary notice of appeal was premature because the trial court had not yet certified the record.⁴ Moreover, the notice of appeal was not authorized by Mr. Lovell, particularly if the effect would be to divest the trial court of jurisdiction to hear the motion to withdraw guilty plea he had himself filed.

⁴ See State v. Jiminez, 938 P.2d 264, 265 (Utah 1997) (no appellate jurisdiction where notice of appeal was prematurely filed).

In cases where unique circumstances result in a post-trial motion being filed after the notice of appeal, the trial court is even more likely to retain jurisdiction. For example, in People v. Canterbury, 730 N.E.2d 1198 (Ill. App. 2000), the defendant, acting *pro se*, simultaneously filed a notice of appeal and a motion to withdraw his guilty plea. On appeal, the court held that the trial court had jurisdiction to adjudicate the defendant's motion to withdraw guilty plea because "the filing of a timely post trial motion directed against the judgment simultaneously with or subsequent to a notice of appeal effectively abandons the appeal and vests the trial court with jurisdiction to adjudicate the post trial motion." Id. at 1201. The court found this ruling to be the "more logical and equitable approach," because any other ruling would mean "indulg[ing] the fiction that defendant intended to secure the trial court's ruling on his motion to withdraw his guilty pleas, . . . and, at the same time, deprive the court of jurisdiction to make that ruling." Id. Similarly, in Davis v. State, 763 So.2d 519 (Fla. App. 2000), the defendant, acting *pro se*, simultaneously gave notice of appeal and moved to withdraw his plea of guilty. On appeal, the court found the "peculiar and particular circumstances" of the case "provided the trial court with jurisdiction to hear the motion." Id. at 521.

The circumstances of this case are particularly unique. Rule 4(b) of the Utah Rules of Appellate Procedure was recently amended to provide that a motion to withdraw guilty plea tolls the time for filing a notice of appeal. A defendant must (under the statute as interpreted in Ostler) file a motion to withdraw a guilty plea within 30 days of sentencing. Prior to the recent amendment of Rule 4(b), in a normal situation, a defendant was also required to file a notice of appeal within 30 days of sentencing in

order to preserve the right of appeal. Accordingly, a motion to withdraw and a notice of appeal could often be filed simultaneously or virtually simultaneously. Under the version of Rule 4(b) at the time of Mr. Lovell's motion, a motion to withdraw guilty plea did **not** toll the time for filing a notice of appeal. Under the old rule, if a notice of appeal divested a trial court of jurisdiction to decide a timely motion to withdraw guilty plea, then it would be a rare circumstance where the trial court would be able to hear and decide such a motion as contemplated by Ostler. It could only do so if a defendant filed a motion to withdraw immediately after the sentencing and the motion was briefed, argued and decided before the 30-day period for filing a notice of appeal ran. If a defendant had not filed the motion to withdraw guilty plea or the trial court had not ruled on such a motion by the 29th day following sentencing, the defendant would have to file his notice of appeal the next day or lose the right to appeal. If a defendant waited until near the end of the 30-day period to file a motion to withdraw guilty plea, as permitted by statute, then he would have to forfeit his right to have the motion to withdraw heard in order to protect his right to appeal. Clearly a defendant cannot be forced to choose between exercising his right to seek to withdraw his plea and his right to appeal.

Moreover, appellate courts should not want a motion to withdraw guilty plea to remain in "limbo" while an appeal proceeds. Appellate courts should prefer a trial court to rule on the motion to withdraw guilty plea so that the entire case would be resolved in a single appeal. Presumably, this was the rationale behind the recent change to Rule 4(b). This Court also recognized this principle in State v. Gibbons, 740 P.2d 1309 (Utah 1987). In that case, the defendant pleaded guilty and was sentenced. Due to unusual

circumstances, including a change of defense counsel during the appeal, a motion to withdraw the plea was never filed in the trial court. Id. at 1311. On appeal, the defendant raised the constitutionality of his guilty plea for the first time. Id. Even though this Court “will not entertain an issue first raised on appeal in the absence of exceptional circumstances or plain error,” this Court remanded the case “to enable defendant to file a motion to withdraw his guilty plea.” Id. This Court remanded to avoid the possibility “of appeals from two different judgments in the same criminal case” because the statute governing the withdrawal of a guilty plea, at that time, “set[] no time limit for filing a motion to withdraw.” Id. Further, this Court noted that its action was “consonant with the policy of allowing trial judges to have the opportunity to address an alleged error.” Id. at 1312 (citation omitted).

Similarly, in State v. Kelly, 770 P.2d 98, 99-100 (Utah 1988), the defendant filed a motion to review his minimum mandatory sentence, and then filed his notice of appeal. The trial court assumed that the filing of the notice of appeal divested the court of jurisdiction and declined to rule on the motion to review the sentence. On appeal, noting that neither party had briefed the issue of whether the notice of appeal had divested the trial court of jurisdiction, this Court assumed that this was the case, and then remanded the case to the trial court to rule on the pending motion to review the sentence. Id.

Here, the trial court had jurisdiction to review Mr. Lovell’s motion to withdraw guilty plea. First, the unusual circumstances of this case demonstrate that the trial court retained jurisdiction to review Mr. Lovell’s motion to withdraw his guilty plea. On August 25, 1993, after trying in vain to contact his attorney for over a week, Mr. Lovell

had written a letter to the trial court containing his motion to withdraw his guilty plea. Five days later, on August 30, 1993, Mr. Lovell's attorney, without consulting Mr. Lovell, filed a notice of appeal. This Court should not indulge the fiction that because his attorney filed a notice of appeal without contacting him, Mr. Lovell intended to deprive the trial court of jurisdiction to hear his motion to withdraw his plea. Since Mr. Lovell's motion to withdraw his guilty plea was timely, the trial court had jurisdiction to review the motion.⁵

B. If a Notice of Appeal Would Divest the Trial Court of Jurisdiction To Consider a Timely, But Later-Filed, Motion To Withdraw Plea, the Trial Court Should Have Determined Which Was "Filed" or "Made" First, or Determined Mr. Lovell's Desires in View of the Patent Conflict Between Mr. Lovell and his Counsel.

If filing a notice appeal would divest the trial court of jurisdiction to consider a later-filed motion to withdraw guilty plea, then the trial court erred in failing to determine which was "filed" or "made" first and in failing to determine Mr. Lovell's desires in view of the conflict between the motion and the notice of appeal. It should not matter whether the motion to withdraw was "made" before or after the notice of appeal was filed, as long

⁵ The State implied before the trial court that Mr. Lovell's appellate counsel acknowledged the lack of jurisdiction by observing that there were "very serious questions about whether this [Trial] Court has jurisdiction" over the motion to withdraw the guilty plea. R. 2242 at page 4. A careful review of that hearing transcript reveals that Mr. Lovell's counsel and Judge Taylor agreed that the issue was confusing and they would wait for guidance from this Court. *Id.* Furthermore, at an earlier hearing on September 20, 1993, the State acknowledged that the trial court retained jurisdiction notwithstanding the notice of appeal. R. 1325-35. Judge Taylor agreed and scheduled the matter for a hearing. *Id.* The point is, subject matter jurisdiction either exists or it does not. It cannot be conferred or removed by the consent of the parties. In any event, the only issue discussed at that hearing was whether the trial court retained jurisdiction to hear the motion while the case was on appeal—not whether jurisdiction was lost for all time.

as both were filed within 30 days of sentencing. But if this Court takes the opposite view, it should rule that Mr. Lovell's motion was "made" prior to the notice of appeal being "filed", or that a "mailbox rule" should apply to determine that Mr. Lovell's motion will be deemed to have been filed prior to the notice of appeal⁶. In any event, if this Court determines that the order of the filings in this case is determinative of jurisdiction, then the trial court should have conducted a hearing in September 1993 to determine whether Mr. Lovell desired to proceed with his *pro se* motion or with the appeal filed by his counsel.

1. Mr. Lovell's Motion To Withdraw Guilty Plea Was "Made" Before the Notice of Appeal Was Filed.

The trial court did not lose jurisdiction of Mr. Lovell's motion to withdraw his guilty plea because his motion was "made" before Mr. Caine filed the notice of appeal. The State's argument that the trial court lost jurisdiction is premised on the assumption that the date stamped by the court clerk on the motion to withdraw is determinative. But unlike Rule 4 of the Utah Rules of Appellate Procedure, the statute governing the withdrawal of guilty pleas does not require that the motion be "filed" with the clerk of the court within the thirty-day period. Rather, Utah Code Ann. § 77-13-6(2)(b) states:

⁶ The trial court erroneously found that "no record exists defendant mailed his motion dated August 25, 1993, on which to base a prison mailbox rule." R. 2252 at page 45 (also attached to the addendum hereto). This finding is clearly erroneous as Mr. Lovell's affidavit indicates that he mailed his letter requesting withdrawal of his guilty plea on August 25, 1993 by giving it to prison authorities that day for mailing pursuant to prison policies. R. 1910. Mr. Lovell's affidavit was neither rebutted, nor challenged by the State. R. 2252 at pages 8-26,40-44.

(2)(b) A request to withdraw a plea of guilty or no contest is *made by motion and shall be made within 30 days* after the entry of the plea.

(Emphasis added.) Rule 12 of the Utah Rules of Criminal Procedure, governing motions, simply requires that the motions be in writing unless otherwise permitted by the court, and state the relief sought and the basis for the motions. Normally, a motion would be served by mail on opposing counsel and filed in due course with the trial court. See Utah R. Crim. P. 3(b) (“Service upon the attorney or upon a party shall be made in the manner provided in civil actions.”); Utah R. Civ. P. 5(b)(1)(B) (“Service by mail is complete upon mailing.”); Utah R. Civ. P. 5(d) (“All papers after the complaint required to be served upon a party shall be filed with court either before *or within a reasonable time after service . . .*”) (emphasis added). The date of mailing controls.

In this case, Mr. Lovell, acting *pro se*, wrote the letter containing his motion to withdraw and placed it in the prison mail system several days before the notice of appeal was filed. Under these circumstances, this Court should hold that Mr. Lovell’s motion to withdraw was “made” prior to the filing of the notice of appeal. Because a motion to withdraw is effective when “made” and does not require filing in court to become effective, Mr. Lovell’s motion to withdraw his plea was effective as of August 25, 1993.⁷

⁷ Contrast the statute providing that a motion to withdraw guilty plea be “made” within 30 days with former Rule 4 of the Utah Rules of Appellate Procedure, which required a notice of appeal to be “filed” within 30 days. In the past, Utah courts felt constrained to require that an inmate actually file a notice of appeal within 30 days because the statute specifically used the word “filed,” unlike the present statute. In State v. Palmer, 777 P.2d 521, 522-23 (Utah App. 1989) (per curiam), and in State v. Parker, 936 P.2d 1118, 1120 (Utah App. 1997), the court of appeals refused to adopt a “mailbox rule” for prisoners (where a motion is deemed filed once it is in the mailbox) for the

2. Under The Circumstances, Equal Protection and Due Process Require Application of a “Mailbox Rule” to Deem that Mr. Lovell’s Motion Was Filed Prior to the Notice of Appeal.

The trial court erred in failing to apply the “mailbox rule” to determine that Mr. Lovell’s motion to withdraw his guilty plea predated the notice of appeal. If this Court were to determine that the order of “filing” is determinative, then due process and equal protection principles require the Court to apply a “mailbox rule” to determine that Mr. Lovell’s motion to withdraw his guilty plea was “filed” prior to the notice of appeal. Because Mr. Lovell was incarcerated and had no means of filing his motion to withdraw

filing of notices of appeal in Utah because Rule 4 specifically stated that the notice of appeal must be “filed with the clerk of the trial court.” The Parker Court bemoaned its holding, agreeing with the United States Supreme Court’s holding in Houston v. Lack, that prison inmates do not have the same access to the court clerks as do other people, but concluding that the court did not have the authority to interpret Rule 4 in a manner inconsistent with its plain language. Parker, 936 P.2d at 1119-22. The Parker Court expressly noted that the due process and equal protection issues at stake had not been adequately briefed, and thus were not considered by the court in reaching its conclusion. Id. at 1122 n.5.

The United States Supreme Court had previously interpreted the federal appellate rule to include the mailbox rule. In Houston v. Lack, 487 U.S. 266 (1988), the United States Supreme Court held a defendant’s notice of appeal in the federal court system was timely filed if he delivered it to proper prison authorities for mailing within the statutory time period. The Court created this “mailbox rule” to address the “unique circumstances” of inmates because “they are not able, either personally or through their attorney, to go directly to the courthouse to file their documents or to pick up the telephone to ascertain whether the papers have been officially filed,” to be consistent with other rules of appellate procedure “wherein a document is deemed filed upon receipt by the district court clerk and not when officially stamped” and to create a bright line rule. Id. at 271-76.

Since Parker was written, in 1998, this Court officially recognized the mailbox rule in Utah Rule of Appellate Procedure 4(f), which provides: “If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution’s internal mail system on or before the last day for filing.”

plea other than by depending on prison authorities to mail it,⁸ the motion should be deemed filed as of the date it was deposited in the prison mail system. To rule otherwise would deny Mr. Lovell equal protection of the laws and due process guaranteed by the Constitution of the United States and the Utah Constitution. It would also violate the “open courts” provision of the Utah Constitution.

It appears that the only Utah opinion touching on the matter is State v. Canfield, 917 P.2d 561 (Utah App. 1996), in which the Utah Court of Appeals, without analysis, declined to adopt a mailbox rule because the defendant’s motion would not have been timely filed, even if a mailbox rule had been applied. Id. In the absence of controlling authority, this Court should follow the example of many other jurisdictions that have adopted mailbox rules similar to that articulated by the United States Supreme Court in Houston (see n.4, infra). In Haag v. State, 591 So. 2d 614 (Fla. 1992), the Florida Supreme Court adopted a mailbox rule because “[u]nder the Florida Constitution, all persons have a right to equal protection of the laws, particularly in matters affecting life and liberty. Obviously, this includes a right of equal access to the courts, which serve as the final arbiter of whether life or liberty may be forfeited lawfully.” Id. at 617 (citing Fla. Const. Art. I, § 2). The Florida Supreme Court reasoned, “A rule other than the

⁸ The trial court file does not contain the postmarked envelope in which Mr. Lovell mailed his August 25, 1993 pro se motion to withdraw his plea. However, this may be of little consequence because the postmarked envelopes of his letters to Judge Taylor dated September 9, 1993, and September 22, 1993, do not contain a “postmark” date showing when they were mailed. Prison officials apparently did not set the postage meter to print the date of outgoing inmate mail. R. 2003, 2005. Mr. Lovell’s affidavit states that placed the motion to withdraw guilty plea in the prison system on August 25, 1993, the date of the letter. R. 1910.

mailbox rule would interject a level of arbitrariness that could undermine equal protection and equal access to the courts.” Id. The court provided this example:

[T]wo *pro se* inmates who delivered a document to prison officials at the same time, seeking the same relief, and facing the same court deadline, could be treated quite differently based entirely on happenstance. One inmate’s petition might make it to the courthouse on time, while the other’s might be delayed for unknown reasons. The first would obtain a full hearing, while the second would be denied relief. Such arbitrariness cannot fairly be characterized either as equal protection or equal access to the courts, and it therefore cannot be allowed.

Id.

The same rationale has been followed by other state courts. See, e.g., Setala v. J.C. Penney Co., 40 P.3d 886, 887-88 (Haw. 2002) (following Haag because the Hawaii Constitution also guarantees every person “equal protection of the laws and equal access to the courts”); Woody v. State, 833 P.2d 257 (Okla. 1992) (finding the Oklahoma Constitution requires the mailbox rule for incarcerated *pro se* prisoners because another rule “would interject a degree of arbitrariness which could sabotage equal protection and equal access to the courts”); Caldwell v. Amend, 30 F.3d 1199 (9th Cir. 1994) (specifically adopting mailbox rule for motion to withdraw guilty plea filed by inmate acting *pro se*).

The Utah Constitution guarantees due process of law,⁹ equal protection or uniform operation of the laws,¹⁰ and open courts.¹¹ The open courts provision is viewed

⁹ Article I, Section 7 of the Utah Constitution provides: “No person shall be deprived of life, liberty or property, without due process of law.”

as a counterpart to the Utah due process provision. See, e.g., Berry v. Beech Aircraft Corp., 717 P.2d 670, 675-76 (Utah 1985). Where matters of life and liberty are at stake, the following elements of due process must be afforded:

(a) the existence of a competent person, body, or agency authorized by law to determine the questions; (b) an *inquiry into the merits* of the questions by such person, body or agency; (c) notice to the person of the inauguration and purpose of the inquiry and the time at which such person should appear if he wishes to be heard; (d) right to appear in person or by counsel; (e) fair opportunity to submit evidence, examine and cross-examine witnesses; (f) judgment to be rendered upon the record thus made.

Christiansen v. Harris, 163 P.2d 314, 317 (Utah 1945) (emphasis added).

Similarly, the uniform operation of the laws provision requires equal protection for all similarly situated individuals. In State v. Mohi, 901 P.2d 991, 997 (Utah 1995), the Utah Supreme Court stated:

[F]or a law to be constitutional under [the provision], it is not enough that it be uniform on its face. What is critical is that the operation of the law be uniform. A law does not operate uniformly if ‘persons similarly situated’ are not ‘treated similarly’ Therefore, [the Court] must first determine what classifications, if any, are created by the statute. Second, [the Court] must determine whether different classes or subclasses are treated disparately. Finally, if any disparate treatment exists between classes or subclasses, we must determine whether the legislature had any reasonable objective that warrants the disparity.

¹⁰ Article I, Section 24 of the Utah Constitution provides: “All laws of a general nature shall have uniform operation.”

¹¹ Article I, Section 11 of the Utah Constitution provides: “All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay”

Id. at 997 (citations omitted, some brackets by the court).

In the absence of a mailbox rule, an incarcerated defendant would be deprived of due process of law if, by no fault of his own, the prison system delayed delivering his mail so that a filing date was affected. Without a mailbox rule, there would be an impermissible classification between those defendants who are not incarcerated, and who are able to file directly their motions to withdraw guilty pleas, and those who are incarcerated and must rely on the prison mail system. Similarly, there would be an impermissible classification between those inmates whose mail happens to be gathered and mailed quickly and those, like Mr. Lovell, whose mail is delayed in the process. Such disparate treatment is not reasonable or warranted by any legitimate justification. Finally, absent a mailbox rule, an incarcerated defendant would not have open access to the courts if the State prison mail system caused a filing to be late.

This Court should rule that the mailbox rule applies in this case such that Mr. Lovell's motion to withdraw guilty plea is deemed filed on August 25, 1993, when he placed it in the prison mail system. Accordingly, Mr. Lovell's motion to withdraw guilty plea preceded the notice of appeal and should have been heard and decided by the trial court. Because it was not decided in the trial court prior to the appeal, it must be resolved now. Mr. Lovell is entitled to an "inquiry into the merits" of his motion.

3. If No "Mailbox Rule" Applies, When Faced With the Inconsistent and Conflicting Actions of Mr. Lovell and His Counsel, the Trial Court Should Have Ascertained How Mr. Lovell Desired to Proceed.

If the "mailbox rule" does not apply, this Court should hold that the trial court erred in failing to ascertain how Mr. Lovell desired to proceed given the conflict between

the course of action taken by Mr. Lovell and his counsel. It is clear from Mr. Lovell's communications with the trial court that he wanted to proceed with the motion to withdraw his plea. It is also clear that Mr. Caine did not communicate with him about his desires and that Mr. Lovell wanted to discharge Mr. Caine as his counsel. If the filing of a notice of appeal would divest the trial court of jurisdiction, the trial court should have observed that Mr. Lovell had mailed his letter containing the motion to withdraw several days before Mr. Caine filed the notice of appeal. The trial court should also have observed from the letter that Mr. Caine was not communicating with his client. The trial court was also aware that Mr. Lovell was unhappy with his appointed counsel and wanted to fire him. In view of the inconsistency between the two actions and the apparent conflict between counsel and client, the trial court should have queried Mr. Lovell whether he intended to appeal at that time and thereby divest the trial court of jurisdiction to hear his motion to withdraw. This is especially true given that Mr. Lovell's choice to proceed with the motion to withdraw could not have waived his right to automatic appeal in a death penalty case. Mr. Lovell cannot be deprived of his right to a hearing on his motion to withdraw plea by the unauthorized and unnecessary actions of his appointed counsel in filing a notice of appeal.

II. MR. LOVELL IS ENTITLED TO A HEARING ON THE MERITS OF HIS MOTION TO WITHDRAW THE GUILTY PLEA.

A. A Motion to Withdraw Guilty Plea Must Be Heard and Resolved in the First Instance by the Trial Court.

This Court should hold that the trial court erred in failing to resolve Mr. Lovell's motion to withdraw guilty plea on the merits. A motion to withdraw a guilty plea must

be resolved in the first instance by the trial court. Appellate courts do not hear motions to withdraw pleas and cannot hear an appeal of a denial of such a motion until there is a final order. See Utah R. App. P. 3(a) (party may appeal “from all final orders and judgments”). Even if one were to assume that the filing of the notice of appeal divested the trial court of jurisdiction over the motion to withdraw, that was only a temporary condition. Once the appeal was resolved, the trial court would regain jurisdiction and should have ruled on the pending motion. The motion did not simply “disappear” or otherwise go away. The trial court regained jurisdiction when this Court remitted the matter to the trial court. See Utah R. Crim. P. 28(c) (“Disposition after appeal---(c) Unless otherwise ordered by the trial court, within 30 days after receipt of the remittitur, the trial court shall notify the parties and place the matter on the calendar for review”).

B. The Motion to Withdraw Guilty Plea Was Never Expressly Resolved by this Court Nor Was It “Implicitly” Resolved Because There Never Was a Ruling of the Trial Court on the Merits of the Motion That Could Be Appealed.

This Court should hold that the trial court erred in ruling that this Court implicitly denied Mr. Lovell’s motion to withdraw guilty plea on direct appeal. This Court never ruled on Mr. Lovell’s motion to withdraw guilty plea. This Court did not decline to grant Mr. Lovell a hearing on his motion, but simply declined to remand pursuant to Rule 23B on that matter.¹² The Court gave no reasons for its decision. While this Court’s decision refers to Mr. Lovell’s motion to withdraw the guilty plea, and to his appellate counsel’s

¹² Rule 23B(a) only allows remand “for entry of findings of fact, necessary for the appellate court’s determination of a claim of ineffective assistance of counsel.” Utah R. App. P. 23B(a). This Court likely did not grant remand on the motion to withdraw guilty plea because it does not fall within the parameters of this rule.

efforts to have the matter remanded to the trial court on the issue of plea withdrawal, the decision does not address the merits of the plea withdrawal issue, which was not raised on direct appeal. See State v. Lovell, 1999 UT 40, ¶ 1, 984 P.2d 382 (listing issues raised on appeal, which did not include claims relating to guilty plea); id. at ¶ 19 (noting Lovell’s motion to withdraw the plea and appellate counsel’s motion to remand to address plea withdrawal).

This Court’s January 17, 1995 order on the Rule 23B motion in fact anticipated that the motion to withdraw the guilty plea would be heard at some later date, stating:

The motion for limited remand is granted for the trial court to enter findings of fact with respect to defendant’s allegation of conflict of interest between defense counsel and the Weber County attorney. No other issue shall be addressed on the remand, *but may be addressed in any appropriate subsequent proceedings.*

(Emphasis added.)

The trial court ruled that the issue was implicitly resolved by this Court on direct appeal. The flaw in the trial court’s analysis is that Mr. Lovell’s motion to withdraw his plea was never an issue on appeal because the trial court never heard the motion in the first instance and there was no order from which an appeal could be taken. This Court could not rule on the merits of the motion to withdraw since it had never been resolved by the trial court and was not ripe for appeal. This ruling also overlooks the fact that the Lovell decision identifies the specific issues raised on appeal, and makes no mention of this Court’s having conducted plain error review. As this Court recently recognized, the Court is not bound to review the entire record for plain error, but may notice palpable

errors *sua sponte* if it so chooses, and relies on the parties to brief the issues, even in capital cases. See, e.g., State v. Honie, 2002 UT 4, ¶¶ 16 & 67, 57 P.3d 977. Mr. Lovell has never had his “day in court” on this motion; he has never received an inquiry into the merits as required by the open courts provision of the Utah Constitution. Christiansen v. Harris, *supra*, 163 P.2d at 316-17. He is entitled to a hearing now.

C. The Motion Was Timely Because Ostler Governs Motions to Withdraw That Were Pending at the Time It Was Decided.

This Court should hold that the trial court erred in applying Price, rather than Ostler, to Mr. Lovell’s motion to withdraw guilty plea which was still pending after Ostler was issued. Because Mr. Lovell’s motion to withdraw had never been heard and was still pending at the time of this Court’s decision in State v. Ostler, 2001 UT 68, 31 P.3d 528 (Utah 2001), the trial court should have applied the Ostler ruling that entitles a defendant, who has moved to withdraw his plea within thirty days from sentencing, a hearing on the merits.

In Ostler, the defendant pled guilty at a plea colloquy on February 19, 1998. Id. at ¶ 2. Three months later, on May 20, 1998, the defendant was sentenced. Id. Nineteen days after sentencing, the defendant filed a motion to withdraw his guilty pleas. Id. The district court denied the defendant’s motion as untimely under Utah Code Ann. § 77-13-6(2)(b), which requires that requests for plea withdrawals be made “within 30 days after the entry of the plea.” Id. The court of appeals affirmed the trial court’s ruling that the defendant’s motion was untimely. Id. at ¶ 3. It relied on State v. Price, 837 P.2d 578 (Utah App. 1992), which held that the thirty-day time limit runs from the date of the plea

colloquy and is jurisdictional in nature. Ostler at ¶ 2. However, the court of appeals vacated the convictions on plain error grounds because the district court failed to strictly comply with Rule 11. Id.

This Court found the statutory language “within 30 days after the entry of the plea” ambiguous because it could reasonably be interpreted to refer either to the time the plea is accepted or to the time of entry of judgment of conviction on the plea, which generally occurs at sentencing. Id. at ¶¶ 8-9. Accordingly, this Court turned to legislative history to resolve the ambiguity. Id. This Court cited legislative debates wherein legislators sought to give a defendant 30 days from “final disposition.” Id. This Court held:

Construing the statute to require the thirty days to run from final disposition is consistent with its purpose of preventing lengthy delays before the filing of motions to withdraw and avoids serious problems that would arise under the State’s view. If the thirty-day limitation ran from the plea colloquy, as the state argues, a district court could not entertain such a motion, even one based on evidence of actual innocence and supported by the prosecution, brought before the entry of judgment and conviction, but more than thirty days from the taking of the plea. Because considerable investigation of the defendant and the crime generally occurs between the taking of pleas and sentencing hearing, often in the form of ninety-day evaluations by Adult Probation and Parole, the *thirty days will frequently run out before sentencing*. Given further the possibility that the investigation itself may occasionally produce information affecting the *validity of the plea* or actual guilt of the defendant, it makes no sense to deprive the district court of the power to review the plea before it enters a judgment of conviction and sentence. Furthermore, because State v. Johnson, 856 P.2d 1064, 1067 (Utah 1993), requires a defendant to move for a withdrawal in the district court before he can challenge a plea on appeal, *his appeal rights on the plea question could be cut off before he*

has even been convicted of the underlying offense. Aside from being absurd, such a result might pose constitutional problems.

Id. at ¶ 10 (emphasis added). Accordingly, this Court overruled Price and held that the thirty-day period begins to run upon “entry of final judgment of conviction at the district court.” Id. at ¶ 11 n.3.

Here, a delay between the plea colloquy and the sentencing resulted in more than 30 days passing between the two dates. Mr. Lovell made his motion to withdraw within three days of the entry of the judgment. Under Ostler, Mr. Lovell’s motion to withdraw guilty plea was timely. However, the trial court applied the old Price rule even though it was overruled by Ostler. The statute at the time Mr. Lovell’s motion was initially made is exactly the same the one that existed at the time the trial court heard and granted the State’s Motion to Dismiss on jurisdictional grounds. The only thing that has changed is that in the interim this Court has ruled that the court of appeals’ reading of “entry of the plea” in Price was incorrect. Mr. Lovell’s motion to withdraw was pending when Ostler was decided, so Ostler governs his motion.

Following the Ostler opinion (in an opinion issued later that same day), the Utah Supreme Court applied the Ostler decision in State v. McGee, 2001 UT 69, 31 P.3d 531, where the defendant’s motion to withdraw the guilty plea had been dismissed as untimely under Price but the issue was preserved on appeal to the Court. This is likely so because:

The long-standing traditional rule is that the law established by a court decision applies both prospectively and retrospectively, even when the decision overrules prior case law. Only if retrospective application of a decision creates “a substantial injustice” will a court limit a new decision to

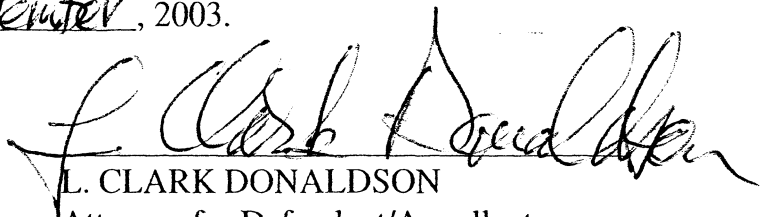
prospective application. Heslop v. Bank of Utah, 839 P.2d 828, 835 (Utah 1992). A substantial injustice is often shown by an impairment of legal interests or expectations that have been created by reliance on the old law.

State v. Saunders, 1999 UT 59; see also Malan v. Lewis, 693 P.2d 661, 676 (Utah 1984) (“The general rule from time immemorial is that the ruling of a court is deemed to state the true nature of the law both retrospectively and prospectively.”). Because Mr. Lovell’s motion to withdraw was pending in the trial court when Ostler issued, Mr. Lovell should be afforded relief under that decision. Cf. State v. Taysom, 886 P.2d 513 n.3 (Utah 1994) (granting benefit of constitutional decision to those with cases pending in district court and on direct appeal); Labrum v. Utah State Bd. of Pardons, 870 P.2d 902, 913-14 (Utah 1993) (same). Any other interpretation would also violate the “open courts” provision of the Utah Constitution because it would unreasonably abrogate Mr. Lovell’s ability to withdraw a guilty plea.

CONCLUSION

Mr. Lovell has never had his “day in court” on his motion to withdraw his guilty plea. No court has ever heard, considered, or ruled on the merits of his motion. He is entitled to that. Accordingly, this Court should reverse the trial court’s Order granting the State’s Motion to Dismiss and Remand to the trial court for a hearing and ruling on the merits of Mr. Lovell’s Motion to Withdraw Guilty Plea.

DATED this 15th day of September, 2003.


L. CLARK DONALDSON
Attorney for Defendant/Appellant
DOUGLAS A. LOVELL

ADDENDUM

WILLIAM F. DAINES, NO. 0805
GARY R. HEWARD, NO. 5085
WEBER COUNTY ATTORNEY'S OFFICE
2380 WASHINGTON BLVD, SUITE 230
OGDEN, UT 84401-1464
Telephone: (801) 399-8377

SECOND DISTRICT COURT
2003 FEB 21 P 4:41

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY,

STATE OF UTAH, OGDEN DEPARTMENT

FEB 25 2003

STATE OF UTAH, Plaintiff, v. DOUGLAS A. LOVELL, Defendant.	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 921900407 (Judge Michael D. Lyon)
--	--

A hearing was held on October 2, 2002 on the Plaintiff's Motion to Dismiss Defendant's Motion to Withdraw his guilty plea. The State was represented by William F. Daines and Gary R. Heward. The defendant was present and represented by Francis M. Wikstrom, L. Clark Donaldson and Christina Jepson Schmutz. After considering the memoranda and arguments of counsel, the court enters the following Findings of Fact, Conclusions of Law and Order

FINDINGS OF FACT

1. Defendant Douglas A. Lovell (Lovell) entered a plea of guilty to Aggravated Murder, a Capital Felony, on June 28, 1993 before Second District Judge Stanton M. Taylor.

2. The Aggravated Murder penalty hearing was held before Second District Judge Stanton M. Taylor on July 29, 30 and August 3, 1993. On August 5, 1993, Judge Taylor ruled beyond a reasonable doubt that both the aggravating circumstances outweighed mitigating circumstances, and the death penalty was justified and appropriate. Lovell was sentenced to death and the judgement was entered on August 18, 1993.

3. Lovell was represented by John T. Caine (Caine) through the guilty plea, penalty hearing and initial filing of the appeal. The Notice of Appeal was filed August 30, 1993. On September 20, 1993, Caine withdrew as counsel at Lovell's request.

4. On August 31, 1993, Lovell's pro se motion to withdraw his guilty plea was received and file stamped by the Second District Court Clerk's office.

5. No evidence exists that Lovell mailed his pro se Motion to Withdraw Guilty Plea dated August 25, 1993 from the Utah State Prison to the Second District Court Clerk's Office in Ogden, Utah.

6. The defendant's Motion to Withdraw Guilty Plea was filed sixty three days after it was tendered to and received by Judge Taylor.

7. The record of the plea colloquy and the written plea form signed by Lovell unambiguously advised him as to the time within which he had to file a motion to withdraw his guilty plea.

8. Lovell petitioned the Utah Supreme Court for a limited remand under Rule 23(b) of the Utah Rules of Appellate Procedure on two separate occasions: August 22, 1994 and November

15, 1994. Lovell's requests for remand raised an issue regarding the withdrawal of the guilty plea as one of several bases.

9. The Utah Supreme Court declined to remand the case on the issue of the withdrawal of the guilty plea and remanded the case only to develop a record on the alleged conflict of interest issue.

10. The Utah Supreme Court ruled in *State v. Lovell*, 984 P.2d 382 (Utah 1999) that all of Lovell's claims failed including his motion to withdraw his guilty plea.

CONCLUSIONS OF LAW

1. *State v. Price*, 837 P.2d 578 (Utah App. 1992) governs the motion to withdraw the guilty plea in this case. Lovell's pro se motion to withdraw his guilty plea was untimely because it was filed sixty three days after he tendered and Judge Taylor received his guilty plea.

2. The filing of the Notice of Appeal by Caine on August 30, 1993 perfected the appeal regardless of any right of automatic appeal from a death verdict under Utah law.

3. Caine's filing of the Notice of Appeal deprived the Second District Court forever of jurisdiction to consider the motion to withdraw the guilty plea absent remand by the Utah Supreme Court on that issue.

4. The Utah Supreme Court's denial of remand on the ground related to withdrawal of the guilty plea and its opinion issued on direct appeal in *State v. Lovell*, 984 P.2d 382 (Utah 1999) which involved review of the entire appellate record foreclose the Second District Court from considering Lovell's motion to withdraw his guilty plea.

5. Rule 68(c) of the Utah Rules of Criminal Procedure does not allow the District Court to consider Lovell's Motion to Withdraw his Guilty Plea after the conviction and sentence were affirmed in *State v. Lovell*, 984 P.2d 382 (Utah 1999) and remitted to the District Court.

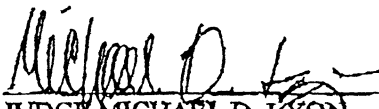
6. The only appropriate forum for Lovell to obtain review of his Motion to Withdraw Guilty Plea is to pursue post conviction relief under Rule 65(c) of the Utah Rules of Civil Procedure

Based upon the foregoing findings of fact, conclusions of law and consideration of the arguments of counsel;

IT IS HEREBY ORDERED that the State's Motion to Dismiss is granted.

DATED this 24 day of Feb 2003.

BY THE COURT:



JUDGE MICHAEL D. LYON
SECOND DISTRICT COURT

Approved at to form:

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Finding of Fact, Conclusions of Law and Order was mailed, postage prepaid, to name, address, this _____ day of _____ 2003.

NEED CARDNEY JR